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No. 97-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

KAREN F. ALEXANDER
Petitioner,

- against -

CHRISTINE TODD WHITMAN; et al.
Respondent.

ON PETITION FOR WRIT OF CERTIORARI

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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49 pp

QUESTIONS PRESENTED

The New Jersey Wrongful Death and Survival Action statutes afford a cause of action to all mothers whose children are tortiously injured prenatally, *at any age of gestation*, and die as a result of that tortious conduct. However, the same statutes deny recovery to one class of mothers despite the fact they can establish every *element of the causes of action*, are in the *identical material circumstances*, and *sustain the identical losses* as the mothers and children who are afforded claims under the statute, only because their children were still in the womb at the moment death ensued from the wrongful act. Kaylyn Alexander, a child who was tortiously and fatally injured at eight-and-one-half months gestation, died immediately prior to delivery by Caesarean Section. Karen Alexander, her mother, challenged the State's denial of Mrs. Alexander's Wrongful Death and Survival Action claims as a violation of the Equal Protection rights of Mrs. Alexander and all mothers and children similarly situated.

1. Does a mother have a fundamental interest in her relationship with her child during pregnancy which is protected by the Due Process clause of the 14th Amendment?

2. Is New Jersey's discriminatory classification and denial of Wrongful Death and Survival Claims to mothers and children such as Karen and Kaylyn Alexander subject to strict scrutiny?

3. Does the denial of a wrongful death or survival suit (which are generally permitted for deaths resulting from prenatal injury) solely on the arbitrary basis of the happenstance that the child died before delivery was completed rather than after delivery, violate the Equal Protection Clause of the Fourteenth Amendment?

4. Does every human being legally within the jurisdiction of New Jersey, including Kaylyn Alexander, a child who died as a result of the tortious acts of others immediately before her birth was completed, and all members of her class, enjoy the Equal Protection of the laws under the Fourteenth Amendment of the United States Constitution as set forth in *Levy v. Louisiana*, 391 U.S. 68 (1968)?

PARTIES TO THE PROCEEDINGS

Petitioner is Karen F. Alexander, the mother of Kaylyn Elissa Alexander, a child who died as the result of negligence of a medical doctor retained to provide competent medical care for both Mrs. Alexander and her daughter. Mrs. Alexander timely instituted wrongful death and survival action claims in the Superior Court of New Jersey against the negligent parties. Despite the fact that the state performed an autopsy on Kaylyn and issued a death certificate in her name identifying her cause of death, the Monmouth County Surrogate refused to issue Mrs. Alexander letters of administration ad prosequendum and general letters of administration because New Jersey is still *one of only ten states* which discriminate against mothers whose children are killed by the tortious acts of wrongdoers only because the children's death ensues in the womb. Because New Jersey permits the claims for other mothers whose children sustain prenatal injuries resulting in death, Mrs. Alexander subsequently instituted this class action pursuant to 42 U.S.C. §1983 and 42 U.S.C. §1988 seeking a declaration that the New Jersey wrongful death and survival action statutes violate the equal protection and due process rights of Karen and Kaylyn Alexander.

The respondents are Christine Todd Whitman, in her capacity as Governor of the State of New Jersey, Peter Verniero, Attorney General of the State of New Jersey and six county Surrogates, Maria Vizcarrondo-DeSoto, Surrogate of Essex County; Susan Hoffman Greene, Surrogate for Hunterdon County; Carol Oswald, Surrogate for Mercer County; Marie S. Muhler, Surrogate of Monmouth County; John Pecoraro, Surrogate of Morris County; Elton A. Conda, Surrogate of Burlington County.

The complaint filed in the District Court included as party defendants the remaining fifteen County Surrogates. After service upon them each of those fifteen Surrogates executed a Consent Order of Judgment signed and filed by the District Court. By the terms of those Orders service of papers and briefs upon those parties are not required.

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In The

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No. 97-

Karen F. Alexander,
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v.

Christine Todd Whitman; Peter Verniero; et al.
Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioner Alexander respectfully prays that a Writ of *Certiorari* issue to review the May 23, 1997 judgment and opinion of the United States Court of Appeals for the Third Circuit.

ORDERS AND OPINIONS DELIVERED IN THE CASE

The United States Court of Appeals for the Third Circuit filed an opinion in this case on May 23, 1997, reported at 114 F.3d 1392 (3rd Cir. 1997) (App., A1-30), and entered an order of judgment affirming the District Court's dismissal of the Complaint (App., A115-116), which filed an opinion and Order dismissing plaintiff's complaint and denying the plaintiff's cross motion for summary judgment on May 18, 1995 (App., A35-48) and entered an Order dated July 10, 1997 affirming the Order of dismissal and fixing costs (App., A113-114).

STATEMENT OF JURISDICTION

Petitioner seeks a Writ of Certiorari to review the final Order of the United States Court of Appeals entered May 23, 1997. The Petitioner has claimed rights under the Constitution of the United

States, the issues presented were properly raised below and jurisdiction of this Court is invoked under 28 U.S.C. §1254 (1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This Petition involves the Equal Protection Clause of the Fourteenth Amendment, U.S. Const., Amend XIV, §1, and asserts that New Jersey's wrongful death [N.J.S.A. 2A:31-1 to 6] and survival action [N.J.S.A. 2A:15-3] statutes violates the Equal Protection rights of Karen and Kaylyn Alexander and those similarly situated [verbatim provisions of the statutes and Amendment XIV, §1 required by R.14(1)(f) are set forth in Appendix at A31-34.

STATEMENT OF THE CASE

The Petitioner, who had instituted a pending State Court action in which she can prove every element of New Jersey's wrongful death and survival action claims against the parties who negligently caused the death of her daughter, instituted this class action because New Jersey denies her the benefits and protection of those statutes - designed to protect the same basic and fundamental interests in the relationship between a mother and child which is protected by the Due Process Clause - only because she is a member of a class of women against whom the state discriminates without any legitimate state interest.

A. THE NATURE OF THE ACTION AND PROCEDURAL HISTORY

The class action complaint, brought pursuant to 42 U.S.C. §1983 and 42 U.S.C. §1988, seeks a declaration that New Jersey's wrongful death and survival action statutes violate the equal protection clause of the 14th Amendment and the issuance of a mandatory injunction. The action, filed on October 24, 1994, was brought by Karen Alexander, a mother whose daughter, Kaylyn, died on July 15, 1992 as a result of medical malpractice (Malpractice complaint A125-146). The District Court had jurisdiction under 28 U.S.C. §1343 and the relief sought is authorized by 28 U.S.C. §2201-2202. Venue was established under 28 U.S. §1391. The Defendants Governor Christine Todd Whitman and the State Attorney General, joined by the Surrogates, moved to dismiss the complaint under Rule 12(b)(6)(31A-33A).

The Plaintiffs cross-moved for Summary Judgment on the counts which seek declaratory and injunctive relief (A110-112), and for class certification. The motions were argued on March 6, 1995. Fifteen of the County Surrogates executed Consent Orders of Judgment, entered on May 18, 1995, barring their opposition to the Plaintiff's claims and consenting to the class certification. The District Court, by order entered May 18, 1995, granted the motion to dismiss the Complaint, denied plaintiffs' motion for Summary Judgment, and dismissed the motion for class certification (App., A35-48). A Notice of Appeal was timely filed on June 15, 1995 appealing all issues as to the first four counts and amended on June 27, 1995 (A160). On May 23, 1997 the U.S. Court of Appeals for the Third Circuit entered an opinion written by Judge Theodore A. McKee and a concurring opinion by Judge Samuel A. Alito affirming the District Court's dismissal of the complaint.

B. STATEMENT OF FACTS

On July 15, 1992, Karen Alexander, pregnant with her thirty-eight week old daughter, Kaylyn, was admitted to Jersey Shore Medical Center for Kaylyn's delivery. Although previously healthy, with vital signs recorded only fourteen minutes prior to birth by cesarean section, Kaylyn expired prior to being born at 3:04 p.m. (A147-150). Following Kaylyn's death Mrs. Alexander asked the nursing staff to bring little Kaylyn to her so she could hold her in her arms. After she held Kaylyn and studied the features of the little girl she carried for almost nine months, it was difficult for Mrs. Alexander to let her daughter go (A149). An autopsy was performed on July 18, and a death certificate was issued showing the baby's date of death, that her name was Kaylyn Elissa Alexander and that she was "stillborn" due to "cardio vascular collapse." Kaylyn's photo taken by the nursing staff appears at A156. On July 13, 1994, Mrs. Alexander filed a complaint for medical malpractice in the Superior Court of New Jersey, Docket No. L-3896-94 (A125-148). Mrs. Alexander obtained medical expert opinions that the baby's injury, pain, suffering and death was due to the malpractice of health care providers on July 15, 1992. The complaint included a wrongful death action and a survival action as a result of the injury, pain, and suffering sustained by Kaylyn prior to death. On October 18 and October 31, 1994, the Surrogate of Monmouth County refused to issue letters of adminis-

tration *ad prosequendum* and general letters of administration of the Estate of Kaylyn Alexander (A122-124). After this action was commenced the malpractice action was stayed by the Superior Court of New Jersey in order to await the outcome of the class action suit. The stay has not been lifted. Upon motion by the defendants in the State Court action Mrs. Alexander's separate claim for emotional distress ("Portee" claim) was dismissed based upon the requirements of substantive state law. (Order, A162-165).

In the federal action it was established that Mrs. Alexander and her daughter had an existing relationship during pregnancy before the child's death (Class Action Complaint, ¶29-38, ¶40; 9A-15A). Kaylyn, throughout pregnancy, was a complete, separate, unique and irreplaceable human being [¶40]. Children experience pain beginning at eight weeks after conception (complaint ¶40; App. at 15A). All of these facts were supported in the record by the Plaintiffs' scientific and medical proofs (89A-111A). The defendants conceded these facts on the motions. New Jersey's Supreme Court has found that children are separate human beings beginning at conception and doctors have an independent duty to the children during pregnancy (see, *infra*, at 8-9:15-16.) The District Court accepted all of these facts as true. The U.S. Court of Appeals expressly accepted all of these facts as true for purposes of its decision. [(114 F.3d 1392, 1396-1397, 1401(text and FN 10); App. A13 (text and FN10); A4-6].

REASONS WHY CERTIORARI SHOULD BE GRANTED

The Writ of Certiorari should be granted in this case under Rule 10(c) for three compelling reasons.

First, as it concerns the Equal Protection rights of Karen Alexander and all women similarly situated, the decision of the U.S. Court of Appeals is in direct conflict with the controlling decisions of this Court - especially those which have set forth the principles of Equal Protection as they apply to wrongful death statutes and where this Court has held a wrongful death statute in violation of Equal Protection Clause - including *Levy v. Louisiana*, 391 U.S. 68 (1960); *Glona v. Amer. Guar. & Liab. Ins. Co.*, 391 U.S. 73 (1968); *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164 (1972); and *Parham v. Hughes*, 441 U.S. 347 (1979). The U.S. Court of Appeals held that the Equal Protection Clause does

not require states to treat similiarly those who are similiarly situated and refused to apply strict scrutiny to a classification of women excluded from the benefits and protection of statutes this Court has previous expressly stated involved interests considered fundamental under the Due Process Clause.

Second, the holding of the Court of Appeals, in deciding the rights of Kaylyn Alexander, that there are human beings who do not have Equal Protection Rights under the Fourteenth Amendment is in direct conflict with this Court's decisions including *Levy v. Louisiana*, *Plyler v. Doe* and *Yick Wo v. Hopkins*.

Third, the incorrect interpretation by the Court of Appeals of this Court's decision in *Roe v. Wade* creates interpretational conflict in the decisions of this Court which only this Court can, and should, resolve.

INTRODUCTION: THE NEW JERSEY WRONGFUL DEATH AND SURVIVAL ACTION STATUTORY SCHEME.

New Jersey is *one of only ten states*[1] which denies recovery to a woman who loses her child as a result of tortious conduct simply because the tortfeasor's acts resulted in the child's death while still in the womb, while permitting the same claim for women whose children of equal or younger gestational age suffer prenatal injuries but the death fortuitously occurs outside of the womb. There simply is no difference in the loss sustained by Mrs. Alexander and those women who are permitted recovery, no legitimate interest of the state which justifies the discriminatory classification, and thus no rational - much less compelling - basis for such discrimination.

Mrs. Alexander's attack on New Jersey's wrongful death statute is based on her own equal protection rights. It is her legal and human interest in her relationship with her child, interests which are protected by the wrongful death statute and deemed fundamental under the Due Process Clause, which she lost when her daughter Kaylyn died at the hands of tortfeasors. Mrs. Alexander was able to establish every element of the wrongful death cause of action.

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[1]See Addendum 3 which lists all states which recognize wrongful death and survival action claims in stillbirth cases.

New Jersey's caselaw has long recognized that those in Kaylyn's class are complete, separate, unique, irreplaceable human beings from the moment of conception. New Jersey did not contend otherwise in this suit. New Jersey admits that Kaylyn and all members of her class are persons in fact and that Mrs. Alexander lost a family member. The New Jersey Supreme Court has stated that the only reason Mrs. Alexander has been denied her wrongful death claim is because more than a century ago the legislature, because of the lack of the benefits of modern scientific and medical knowledge, operated under the erroneous belief that a baby was not a human being before birth, but only a "part of the mother". In this case New Jersey now maintains the position that it does not need a valid interest to deny Mrs. Alexander a claim. Thus, third parties can negligently or even intentionally kill a child against the mother's will with effective impunity as long as that mother is a member of the class discriminated against.

The U.S. Court of Appeals accepted the facts advanced by the plaintiff as true but issued a decision upholding the statute in direct conflict with the controlling decisions of this Court, and all of this Court's holdings on challenges to Wrongful Death Statutes.

A. Compensable Prenatal Torts, and The Purposes and Deterrence Policy of New Jersey Tort Law

New Jersey extends personal injury claims to children who are injured as a result of tortious conduct when the child is in utero at the time of the injury, trauma or tortious act which forms the basis for liability. *Smith v. Brennan*, 157 A.2d 497 (N.J. 1960). Tortious acts committed at any time between conception and birth which cause injury are actionable, since the purpose of the claim for prenatal injuries is to provide protection of the health and life of children throughout the entire period of gestation. *Id.* Three of the reasons *Smith v. Brennan* recognized the cause of action for prenatal trauma are relevant to this case.

First, the previous denial of a claim for prenatal injuries was based upon a false assumption of medical and scientific fact first found in *Dietrich v. Inhabitants of Northampton*, 138 Mass. 14, 52 Am. Rep. 242 (Sup. Jud. Ct. 1884). Correcting this false assumption, *Smith* held that it is a scientific fact that a child has a separate existence from her mother from conception:

> Medical authorities have long recognized that a child is in existence from the moment of conception, and not merely a part of its mother's body. id. at 502.

Second, *Smith* rejected the argument that proof of a causal connection between tortious conduct and an injury not discovered until birth or later is so difficult:

> ...the mere difficulty of proving a fact is not a very good reason for blocking all attempts to prove it. *Smith* at 503.

Third, *Smith* rejected limiting the claim to injuries sustained only after the baby reaches the age of so-called "viability".

> The viability distinction has no relevance to the injustice of denying recovery for harm which can be proved to have resulted from the wrongful act....And since it has no cogent medical reason to support it, and no relevancy to the harm resulting from prenatal injury, we do not believe that it has any place in the determination of the question of liability for wrongful conduct. *Smith* at 504-505.

New Jersey tort law has two separate purposes: to compensate victims of wrongful conduct. *N.J. Power & Light Co. v. Mabee*, 197 A.2d 194, 195-196 (N.J. 1964); and the protection of the health and lives of individuals by deterring tortious conduct before it occurs through a legal system which imposes liability upon the wrongdoer. *Cowan v. Doering*, 545 A.2d 159, 167 (N.J. 1988); *Weinberg v. Dinger*, 524 A.2d, 336, 375 (N.J. 1987); *People Express v. Conrail*, 495 A.2d 107, 111 (N.J. 1985).

> ...the policy that undergirds our immunity ... will deter fault-based "system of tort law [includes] *the discouragement of unreasonable conduct...*[e]liminating immunity ... will deter unreasonable conduct." Cowan, at 167 (emphasis added).

> Imposing liability on defendants for their negligent conduct *discourages others from similar tortious behavior, fosters safer products to aid our daily tasks, vindicates reasonable conduct that has regard for the safety of others....Peoples Express,* 495 A.2d at 111 (emphasis added).

New Jersey's tort law has developed in recognition that doctors alter their conduct based upon fear of tort liability. See, e.g. *Carey v. Lovett*, 622 A.2d 1279, 1287 (N.J. 1993). Since tortious conduct is not criminal the deterrence effect of tort law is, in most instances, the only protection of persons which helps prevent harm before it occurs.

B. Claims Created Under New Jersey Law for Prenatal Injuries which Result in a Child's Death

1. The Wrongful Death Claim

The wrongful death statute (*N.J.S.A. 2A:31-1 to 6*) creates a claim for a mother whose child dies as a result of tortious conduct. *Green v. Bittner*, 424 A.2d 210 (N.J. 1980). It did not exist at British or early American Common Law and constitutes an entirely new cause of action. *Giardina v. Bennett*, 545 A.2d 139, 145 (N.J. 1988). The action is brought by an administrator ad prosequendum. *N.J.S.A.* §2A:31-2. The beneficiaries are those family members entitled to receive intestate property and it is not required that they were dependent upon the decedent. *N.J.S.A.* 2A:31-4; *Cassano v. Durham*, 436 A.2d 118 (N.J.L.D. 1981).

Under the act a mother is entitled to recovery for the "pecuniary" value of the loss of the companionship of her child due to the child's death. *Green v. Bittner, supra*; Carey v. Lovett, 622 A.2d 1279, 1295 (1993). The damages are derived from, and provide compensation for, the loss of companionship and special relationship between a mother and her child over the child's lifetime. *Green* at 217; see, also *Giardina* at 140. Thus the mother's interest in the relationship with her child is the same interest protected by the Due Process Clause as fundamental. See, e.g. *Santosky v. Kraemer*, 455 U.S. 745, 753, 759 (1982); *Lassiter v. Dept. of Soc. Serv.*, 452 U.S. 18, 27 (1981); *Stanley v. Illinois*, 405 U.S. 645, 651 (1972); *Lehr v. Robertson*, 463 U.S. 248 (1983); *Levy v. Louisiana, supra* at 71; *Farley v. Sartin*, 466 S.E. 2d 522, 530-531 (W.Va.,1995).

The wrongful death claim is but one of three causes of action for prenatal injuries which result in the child's death. New Jersey also recognizes survival action claims and the so-called *Portee* claims. The three separate claims, however, each protect distinctly different interests, and compensate for very different losses.

2. The Survival Action Claim

The survival action statute, *N.J.S.A.* 2A:15-3, which repeals the common law rule that an action for personal injury extinguishes upon the death of the injured party, gives the estate of an injured child the claim the child would have had if the child's death had not ensued. *Dyer v. City of Newark*, 416 A.2d 429 (N.J.A.D. 1988); *Soden v. Trenton and Mercer Cty. Trust Co.*, 127 A. 558 (N.J. 1925); *Alfone v. Sarno*, 97 N.J. 99, 105-110 (1981); see, *Giardina* at 146. It is brought by the General Administrator of the decedent's estate. *Hickman v. Taylor*, 75 F.Supp. 528 (D.C. Pa 1948), aff. 170 F.2d 327. The damages recoverable are for the pain and suffering of the decedent between the time of injury and death. *Foster v. Maldonado*, 315 F.Supp. 1179 (N.J. 1970). The estate may also recover hedonic damages - the loss by the decedent, while alive, of the enjoyment of life - even if the injured child was unconscious and unable to appreciate her incapacitation. *Eyoma v. Falco*, 589 A.2d 653, 658 (N.J.A.D. 1991). The survival action is designed to protect, not the personal interests of the mother, but the health and life of the child (where the child is the potential victim). The losses for which compensation is awarded, therefore, are to compensate for the injury to the child while alive, rather than the loss to the mother.

3. The *Portee* Claim

One who suffers severe psychological injury as a result of witnessing the injury and death of a close family member has a claim for emotional distress. *Portee v. Jaffee*, 417 A.2d 521 (N.J. 1980). New Jersey recognizes this claim for mothers of children who suffer prenatal injuries which result in the child's death in both stillbirth cases, *Giardina v. Bennett*, at 140-143 (N.J. 1988), and live birth cases, *Carey v. Lovett*, 622 A.2d 1279 (N.J. 1993).

> We recognized in these...malpractice cases that the malpractice eventuating in the tragic births had a direct and foreseeable impact on the family as a unit. *This was a reflection of the strong and intimate bonds between the respective parents and their child. The relationships in this case are not different and the expectations of the parents are not distinguishable. Consequently, the parental and family interests, and the duty to*

protect those interests, are the same. Giardina v. Bennett, at 142 (emphasis added).

The *Portee* claim is designed to protect the health of the mother, rather than the mother's relationship with the child or the child's health and life. The *Portee* damages are measured to compensate for the emotional distress of the mother due to the "loss of a loved one". However, to recover the mother must demonstrate an emotional distress of a very severe nature; thus, mothers in stillbirth claims usually do not have a cognizable *Portee* claim. *Matawaran v. Thompson, et al.* Sup.Ct. of N.J.App.Div., June 19, 1996 [App, A103-109]; see also *Carey v. Lovett*, 132 N.J. at 62; *Dunphy v. Gregor*, 136 N.J. 99, 108 (1994).[2]

The *Portee* claim is not designed to replace the wrongful death or survival actions, but is merely a recent complement of those claims intended to protect a separate and distinct interest of the mother. These three claims -wrongful death, survival action and the *Portee* claim - although having a common source, protect different interests and provide different damages for different losses. Addendum 1 found at the end of this Petition is a chart, a part of the record below, comparing these three claims for prenatal injuries to a child which result in the child's death.

C. The Excluded Class Under the Wrongful Death and Survival Action Statutes.

Although New Jersey permits wrongful death and survival claims for mothers whose children are injured in utero at *any* gestational age, which results in the child's death, New Jersey denies those claims to such mothers if the child happens to be in the womb, not at the time of the wrongful act, but only at the moment death. *Giardina*, at 143-147.

1. The Nature and Scope of The Excluded Cases

Children who die from a prenatal injury qualify for a survival action and their mothers possess a wrongful death claim. The class

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[2]Mrs. Alexander's *Portee* claim was dismissed in the State Court because she could'nt establish the minimum severity required. (Order, App.A-162).

of mothers and children who are denied these claims are only those where the child's death ensues in the womb. The classification has nothing to do with age, development, the harm to the mother or child, or any quality of the human being. It is an arbitrary class who are found among the same class of persons to whom the wrongful death and survival action claims are extended. One mother and her child have claims while another mother and child have none, even where the child's age, development, life, the value of that life, and the mother's loss are the same.[3]

The class of mothers who are permitted wrongful death and survival action claims involve children of every age from conception to birth constituting one class without reference to so-called "viability". Those who are among the class excluded for the benefit of the statute likewise involve children who are both pre-viability and post-viability. *Smith v. Brennan*, 157 A.2d 497, 504-505 (N.J. 1960) (p.6-7 *supra*). The duty to avoid injury to a child, and the liability resulting from a breach of that duty, is unrelated to "viability". *Smith*, at 504, 505. (See quote p.7 *supra*).[4]

2. The State's only Basis for Excluding the Class of Mothers from its Protection has been Acknowledged by New Jersey to be an Incorrect Assumption of Fact.

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[3]Members of the class of mothers whose children sustain prenatal injuries and die in utero, are members of the larger class of mothers whose children sustain prenatal injuries which result in death. They, in turn, are members of the larger class of mothers whose children sustain prenatal injuries. Addendum 2, which was a part of the record below, found at the end of the Petition, diagrams the relationship of these classes and subclasses.

[4]Confusion concerning the relevence of "viability" derives from this Court holding that "viability" is relevant to the *competing* interests where a mother seeks to terminate a pregnancy. See, *Roe v. Wade*, 410 U.S. 113 (1973); *Planned Parent. of S.E. Pa. v. Casey*, 505 U.S. 833 (1992). The relevence of "viability" is limited to the unique considerations involved in balancing the competing interests of the state with the right to an abortion. In the present case there are no competing interests to balance. The mother's fundamental interest in her relationship with her child, her interest in her child's life, the child's interest in her own life and the state's interest in the health and life of the child and mother are all in harmony and seek the identical result: protection of the child's life. See *Farley v. Sartin*, 466 S.E. 2d 522, 526-535, (W.Va. 1995).

The New Jersey Supreme Court emphasized that it did not exclude stillbirth claims because "prenatal" injury would pose special problems of proof:

> Our reasons for not adopting a more expansive interpretation of the statutory term "persons" in this context do not relate to the speculative nature of damages that would occur if fetal death qualified as any actionable wrongful death under the act. *Giardina v. Bennett* at 147.
>
> ...the mere difficulty of proving a fact is not a very good reason for blocking all attempts to prove it. *Smith*, 157 A.2d at 503.

The United States Supreme Court has indicated that in Equal Protection cases, like this, difficulty of proofs cannot support an otherwise impermissible classification:

> Problems of proof cannot justify an impenetrable barrier that works to shield otherwise invidious discrimination. *Gomez v. Perez*, 409 U.S. 535, 538 (1973).

The only reason the statute is interpreted to exclude mothers whose children's prenatal injuries result in pre-birth death instead of post-birth death is an assumption of fact made more than a century ago which New Jersey's Supreme Court in *Smith*, at 502-505, has since said was false:

> The Act thus refers specifically to the wrongful death of a "person," to the "person injured," and to the "death of the person injured."...At the time the Act was enacted it was not generally thought that a fetus could be considered a "person," in a legal or juridical sense. This is evidenced by the common law, which treated an unborn child as being "merely a part of his mother without separate existence or personality." *Smith v. Brennan*, 157 A.2d 497, 502-503 (N.J. 1960) (discussing common-law treatment of the unborn); *(other citations omitted)*...It is readily inferable that the Legislature adopted this common-law understanding of the concept of a "person" in the adoption of the Wrongful Death Act. *Giardina,* at 143.

This erroneous assumption of medical fact--that the child is

"merely a part of his mother without separate existence or personality"--is the same erroneous assumption found to be false in *Smith v. Brennan*, 157 A.2d 497, 502-503 (N.J. 1960). In *Smith* the same court recognized that it could no longer ignore that the child was *in fact a separate individual human being.* The New Jersey Supreme Court therefore has found that the only "basis" for the classification which discriminates against Karen and Kaylyn Alexander is a complete mistake it sought to correct in 1960.

The great irony of *Giardina* is that it recognized the child (before birth) as a person in fact and extended *Portee* claims to the mother for the wrongful death of children who died as a result of injuries in utero. However, the Court used the archaic mistake of fact, which it knew to be false - that the child is "only part of her mother" - as a basis to deny wrongful death claims to mothers of only some of the class of children injured in utero. That is, the State denies the wrongful death claim of mothers of children who died from injury sustained in utero only if the death arbitrarily ensued in the womb.

The survival action statute also arbitrarily excludes these children from its protection. *Giardina*, at 146. *Giardina* (citing *Smith v. Brennan)* ruled that because the child could recover for prenatal injuries, this fact satisfied the statutory requirement limiting recovery to situations where the decedent's death is one "such as would, if death had not ensued, have entitled" the child to maintain an action for "damages resulting from the injury."[5]

The fact that a child, beginning eight weeks after conception, can experience pain renders the injury compensable under New Jersey law [see, *Carey,* at 1290-1291 (pain of new born, although not capable of articulation and not conscious in the broadest

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[5]*Giardina* observed: "We note that under *Smith, supra*, a child may recover for tortiously inflicted prenatal injuries, and find that this satisfies the requirement limiting recovery to situations where the decedent's death was one "such as would, if death had not ensued, have entitled the person injured to maintain an action for damages resulting from the injury." *N.J.S.A.* 2A:31-1; *see Graf, supra*, 43 N.J. at 305-06 (reaching some (sic) conclusion on the meaning of requirement that recovery be possible only if party could have recovered if she had not died); *see also Presslaf v. Robins*, 168 N.J.Super. 543 (App.Div.1979) ("if death had not ensued" language intended only to qualify kind of actionable conduct of tort-feasor that will support lawsuit). We thus disagree with those jurisdictions that would disqualify a fetus on these grounds." *Giardina*, 545 A.2d at 146 (n.2).

sense, is compensable)], the only bar to recovery being that the tortious act caused a pre-birth death of the child, instead of a post-birth death. The only "basis" for this classification is the false assumption of fact which New Jersey discarded in 1960.

I. THE DECISION OF THE U.S. COURT OF APPEALS CONCERNING THE EQUAL PROTECTION RIGHTS OF MRS. ALEXANDER AND ALL WOMEN SIMILIARLY SITUATED DIRECTLY CONFLICTS WITH ALL OF THE CONTROLLING DECISIONS OF THIS COURT.

The U.S. Court of Appeals sets forth its decision and analysis concerning the Equal Protection rights of Mrs. Alexander at 114 F.3d 1406 - 1408 [App.,A25 toA28]. Its decision is in direct conflict with the controlling decisions of this Court in *Levy v. Louisiana*, 391 U.S. 68 (1968), *Glona v. Amer. Guar. Liab. Ins. Co.*, 391 U.S. 73 (1968), *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164 (1972), and other decisions of this Court.

A. The Decision of the Court of Appeals is in Direct Conflict with *Glona v. Amer. Guar.* and is based upon its Express Statement that the Equal Protection Clause does not Require a State to Treat Similiarly Those Persons Who are Similiarly Situated, a Premise which Conflicts with The Most Basic Tenets of Equal Protection Jurisprudence as Defined by this Court.

In *Glona v. Amer. Guar. & Liab. Ins. Co.*, 391 U.S. 73 (1968) this Court held that Louisiana violated the Equal Protection Clause by denying a class of mothers claims under its wrongful death statute. In *Glona*, just as in this case, the Equal Protection rights violated was that of a mother whose child died as the result of the tortious conduct of others. Louisiana denied the plaintiff the benefits of the wrongful death statute because Louisiana created the legal fiction that a child born out of wedlock was a non-person and therefore the mother did not sustain the loss of her child. Like Louisiana, New Jersey denies Mrs. Alexander a claim because New Jersey has created the legal fiction that Kaylyn Alexander is "a non-person" under its wrongful death statute and therefore Karen Alexander never sustained the loss of her daughter. Both states ignored the reality that the child existed and the mother had an

actual interest in, and relationship with, the child.

Glona emphasized that a state is not free to create classifications in wrongful death cases which deny claims by ignoring the factual relationships involved. The actual facts, not legal definitions which fictionalize or ignore them, define the classes which are relevant to determine who are similarly situated for purposes of Equal Protection analysis. *Glona* eloquently observed:

> "To say that the test of Equal Protection should be the 'legal' rather than the biological relationship is to avoid the issue. For the Equal Protection clause necessarily limits the authority of a state to draw such 'legal' lines as it chooses." *Glona*, at 75, 76.

In this case the U.S. Court of Appeals totally ignored the reasoning and holding in *Glona*. The Court of Appeals failed to acknowledge this aspect of *Glona* and identify in what way there are any material factual differences between the mothers whose losses are compensated and those whose losses are not. In fact, the Court did not even mention *Glona* in its Equal Protection analysis and although it cites *Glona* in passing in a different section, 114 F.3d at 1404-05, it never addressed these principles or the *Glona* holding. Instead, the Court of Appeals stated:

> Ms. Alexander's argument fails because she also argues that there is no difference between the mothers in those two classes. She asserts that mothers in her class sustained "the same loss as other mothers to whom New Jersey gives the claim." Appellants' Brief, at 19. *While that may be true insofar as it states the similarity between the respective tragedies, it is not true insofar as it attempts to foster a principle of Equal Protection jurisprudence.* 114 F.3d at 140(emphasis added).

The statement of the Third Circuit, that "similarity" of one's situation is irrelevant to "principle(s) of Equal Protection jurisprudence," is a fundamental misstatement of constitutional principles which conflicts with every case this Court has decided in the area of Equal Protection. All persons "similarly situated" or "similarly circumstanced" shall be "treated alike" or "similarly treated". *Plyler v. Doe*, 457 U.S. 202, 216 (1982); *Glona, supra*;

Tussman and ten Broek, The Equal Protection of the Law, 37 Calif. L. Rev. 341 (1949). The location of the child at the moment of death ensues no more operates to define, alter or affect the nature, character, or extent of the loss each mother sustained, or the similarity of the circumstances of those mothers, than did the fact of whether or not the mother in *Glona* was married when she gave birth to the child tortiously killed. Likewise, a mother who losses a child at six months gestation, or any gestational age who is compensated for that loss under the New Jersey statute has sustained no greater or lesser loss than did Karen Alexander when her child died at eight and a half months gestation. The losses of those who are allowed recovery are identical to the loss of Mrs. Alexander. In fact, had she carried identical twins, conceived at the same time whose deaths were caused by the very same tortious act, the loss of one would be compensable, while not the loss of the other, if death ensued after birth for only one of them. The classification of New Jersey's statute defines the very meaning of an arbitrary classification.

The statement of the Court of Appeals aknowledges that Mrs. Alexander is similiarly situated to other mothers whose loss is compensated under the statute. The state has never even alleged a difference in such losses. The fact that the loss sustained in pre-birth deaths and post-birth deaths are the same is not only admitted by New Jersey, but is the basis of the so-called *Portee* claim.

The relationship of Karen and Kaylyn Alexander, according to *Giardina*, involves the "intimate bonds" and the "intimate relationships" between a mother and her child during pregnancy and "*parental and family interests, and the duty to protect those interests, are the same*" in still-birth cases as where the baby is born alive. The two circumstances "are not different," and the "expectations" in the first are "not distinguishable" from the second. 545 A.2d at 142. The mothers in *Scafidi v. Seiler*, 574 A.2d 398 (N.J. 1990) (live birth at 26 weeks gestation), *Carey* (live birth), *Giardina* (still birth), and Mrs. Alexander all had the same "relationship,"[6] the same "expectations" and the same loss.

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[6] *Carey*, eloquently described the intimate relationship of mother and child during pregnancy which the law protects:

The unique relationship between a pregnant woman and her baby

Giardina recognized that all children, including "stillborn", are persons both in fact and law. New Jersey recognizes that a child, while in her mother's womb, is a person in fact, and recognizes the child's "legal status" as a person - "a loved one". *Giardina*, at 143. Therefore, New Jersey recognizes the "legal" status of Kaylyn Alexander as person for purposes of the *Portee* claim, but arbitrarily withholds the "legal" status of person for purposes of the wrongful death claim while, obviously, she is a person in both factual circumstance since both claims would arise out of the same tortious act at the same moment in time. This is exactly the kind of "legal" distinction which *Glona* at 75, 76 stated was forbidden by Equal Protection.

The life of every child is equal under the law. *Glona* held that being similarly situated with respect to the loss actually sustained was the relevent basis for determining an equal protection violation.

B. The Standard of Scrutiny: the Decision of the Court of Appeals is in Direct Conflict with *Weber v. Aetna* and other Precedents of this Court.

The Court of Appeals in this case applied only the rational basis standard of review to the discriminatory classification (114 F.3d at 1407-1408) in direct conflict with *Weber v. Aetna*, 406 U.S. 164 (1992) in which this Court made it clear that a classification in a wrongful death statute must be subjected to strict scrutiny and only a compelling state interest can justify it. *Weber*, 406 U.S. at 172-173. The fact that the Court of Appeals ignored the holding of *Weber* requires the issuance of a Writ of Certiorari.

Weber held that because the wrongful death portion of Louisiana's worker's compensation statute implicated personal interests it must be subjected to strict scrutiny:

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mitigates the need for the additional requirements of an "indirect claim" for emotional distress. Bound by physical and emotional ties, mother and baby are so closely joined that we need not require that the mother be "shocked" by malpractice on the baby. The maternal-fetal relationship bespeaks the genuineness of an otherwise-valid claim for emotional distress...*Carey*, at 1285-1287

> Though the latitude given state economic and social regulation is necessarily broad, when state statutory classifications approach sensitive and fundamental personal rights, this Court exercises a stricter scrutiny. (citations omitted). The essential inquiry in all the foregoing cases is, however, inevitably a dual one: What legitimate state interest does the classification promote? What fundamental personal rights might the classification endanger? 406 U.S. at 172-173.

The Court of Appeals fails to cite either *Weber* or *Levy* in its section on Mrs. Alexander's Equal Protection rights. That Court does, however, in its Due Process section, acknowledge that *Levy* clearly held that the relationship of parent and child were involved in the wrongful death statute and that this Court's recognition of that involvement "informed the decisions in *Glona* and *Weber*." 114 F.3d at 1404-1405. Likewise the Court of Appeals acknowledged that *Weber* employed strict scrutiny. At 1405.

The *Weber* court acknowledged that Louisiana had advanced a state interest which was legitimate, *Weber*, at 173, but because it was not a "compelling interest" necessary to justify a classification which "endangers" a fundamental right, the statute was held to violate the Equal Protection Clause.

> Whatever the merits elsewhere of this contention (promoting the state's interest in protecting "legitimate family relationships"), it is not compelling in a statutory compensation scheme..." 406 U.S. at 173.

This Court first concluded that wrongful death statutes "involve the intimate, familial relationship between a child and his own mother" in *Levy*, *supra*, at 71. *Levy*, published four years before *Weber*, emphasized the Court's heightened scrutiny when basic civil rights are involved:

> [W]e have been extremely sensitive when it comes to basic civil rights (citations omitted) and have not hesitated to strike down an invidious classification even though it had history and tradition on its side. (citations omitted). The rights asserted here involve the intimate, familial relationship between a child and his own mother. 391 U.S. at 71.

Nevertheless, the Third Circuit ignored the holdings of *Levy*, *Glona* and *Weber*, cases in which this Court struck down wrongful death statutes because they involved relationships deemed fundamental and discriminated in their protection of those interests without any compelling interest to justify that discrimination. Instead the Court below offered an unintelligible interpretation of *Levy*, no analysis of *Glona (the case which most parallels this one) at all*, and no attempt to explain the strict scrutiny applied in *Weber*.

It is odd, and totally incorrect, for the Court of Appeals to suggest that "the interest in issue" in *Levy*, *Glona* and *Weber* was an "interest" in "the classification of the child's legitimacy". 113 F.3d at 1405. Those cases involved an interest in equal protection and equal treatment under the law. This Court sustained challenges to wrongful death statutes because the classification of mothers (*Glona*) and children (*Levy*) based upon the marital status of the mother at the time of birth had nothing to do with the nature of the existing relationship, the nature of the loss to the mother in *Glona*, to the children in *Levy* and *Weber*, or the purpose of a statute designed to compensate a loss where a tortfeasor wrongfully kills the child.

Second, the attempt by the Court of Appeals to distinguish the holding in *Glona*, where the mother's Equal Protection interests were at stake, by saying the classification in *Glona* was unreasonable because the child was not involved in the conduct of the adult is absurd. The mother in *Glona* whose Equal Protection Rights were asserted was directly involved in the conduct of producing an out-of-wedlock birth, conduct which Louisiana tried to discourage by refusing to permit the mother to recover under the wrongful death statute. The reasoning applied to the child in that regard did not apply to her. Obviously, a state interest in legitimate family relationships and deterrence of out-of-wedlock births did not justify the discrimination against the mother because a basic civil right and fundamental interest was involved and because the classification bore no relationship to the purpose of the wrongful death statutes (See, *Weber* at 175).

The Court of Appeals offered no explanation why it ignored *Weber's* requirement of a compelling state interest. The Court seems to make an attempt to justify ignoring *Weber* (and even *Glona*) by pointing out that one wrongful death statute which excluded a small class of fathers from its benefits was upheld in

Parham v. Hughes, 441 U.S. 347 (1979). But a close analysis of *Parham* only supports Mrs. Alexander's position and underscores the error of the Court of Appeals in its failure to follow *Weber*, *Levy* and *Glona*. The small portion of the class of fathers of illegitimate children who were excluded from the benefits and protection of Georgia's wrongful death statute did not have either an actual *relationship* with their children of a *nature* which was intended to be protected by Georgia's wrongful death statute or a relationship with their children of a nature which gives rise to an interest protected as fundamental under the Due Process Clause.

The New Jersey statute excludes Mrs. Alexander despite the fact she possessed exactly the kind of relationship the statute is intended to protect, and does protect for others similiarly situated. Moreover, Mrs. Alexander's relationship with Kaylyn is one protected as fundamental under the Due Process Clause. Kaylyn was conceived in marriage in a traditional family. The plaintiff in *Parham* "fathered" the child out-of-wedlock, never lived with the child, never had custody, and despite the state extending him the opportunity to legally accept the duties of fatherhood by legitimizing his child, failed to do so. Under those circumstances the Georgia statute did not permit him to sue where the child, for whom he never took proper responsibility as a father, died. It was not the kind of relationship Georgia sought to protect, and therefore the exclusion of this small class of fathers did have a relationship to the purpose of the statute in strong contrast to the excluded classes in *Glona*, *Levy* and *Weber*, and this case. Likewise, unlike *Weber*, *Levy* and *Glona*, the father in *Parham* did not have a relationship which gave rise to an interest protected by Due Process as fundamental. This Court's holdings in a line of cases dealing with the issue of whether and to what extent a natural father of a child born out-of-wedlock enjoys any Due Process protection of his relationship with the child explains both the different result in *Glona* and *Parham* and underscores that *Weber* applied strict scrutiny because of the fundamental rights involved.

At the time *Levy* and *Glona* were decided in 1968, this Court had never directly addressed whether a parent enjoyed an interest protected by Due Process in a relationship with an illegitimate child. The first such case was *Stanley v. Illinois*, 405 U.S. 645 (1972), argued and published shortly before *Weber* was decided. Prior to *Levy* and *Glona* the Court had held that the relationship

and companionship between parent and child was protected as a fundamental due process liberty interest, but only in the context of the traditional family. See, e.g. *Meyer v. Nebraska*, 262 U.S. 390 (1922); *Pierce v. Society of Sisters*, 268 U.S. 510, 534-536 (1924); *May v. Anderson,* 345 U.S. 528 (1953). The relationship within marriage and the traditional family is always protected as fundamental. *Moore v. City of East Cleveland,* 431 U.S. 494, 503 (1977); *Santosky v. Kraemer*, 455 U.S. 745, 753, 759 (1982). Entitlement to such protection has been said to be "self evident." *Lehr v. Robertson*, 464 U.S. 248, 256 (1982).

Stanley established that a father who had an actual relationship with his illegitimate child enjoyed a liberty interest protected by Due Process. When *Weber* was decided, therefore, this Court had established that the parent of a child born out-of-wedlock could have a protectable Due Process interest. But the degree of constitutional protection afforded a father of a child born out-of-wedlock depends upon the strength of the relationship and there exists a very strong correlation between the duty to the child accepted by the father and the degree of protection of the interest provided by the Due Process Clause. See and compare, *Stanley v. Illinois*, *supra*, *Caban v. Mohammed*, 441 U.S. 350 (1979) [two cases where statutes were struck down as violative of the Due Process interests of a father of a child born out-of-wedlock] with *Quillion v. Wolcott*, 434 U.S. 246 (1978); *Lehr v. Robertson*, 463 U.S. 248 (1983); [two cases where the father's relationship with a child born out-of-wedlock was not sufficient to justify due process protection] and *Michael H. v. Gerald D.*, 491 U.S. 110 (1989) [the relationship of a father and child, where the father was not married to the child's mother, was not recognized as sufficiently vital to defeat the rights of the family unit and of the natural mother and her husband).

The different results in *Glona* (where the statute was held violative of Equal Protection) and *Parham* (where the statute excluded no mother, but only those fathers of illegitimates who never legitimized their children) is due in part to the fact that a mother who carries a child always has a fundamental interest in the relationship. *Lehr v. Robertson*, 464 U.S. 248, 256 (1982)(entitlement to the protection is "self-evident" at 256); *Caban v. Mohammed*, 441 U.S. 380, 397(1979).

In short, contrary to the comments of the Court of Appeals, the fact of illegitimacy operated against the litigants in *Levy*, *Glona* and

Weber, but, under the circumstances of the relationships in question, did not abrogate the fundamental interests involved. The reason the father did not have a successful Equal Protection challenge in *Parham* was because he did not enjoy an interest considered fundamental and the classification bore a valid relationship to the purpose of the wrongful death statute since he did not have a relationship which the statute was designed to protect in the first instance.

Finally, the Court of Appeal is in conflict with *Weber* and other decisions of this Court concerning when strict scrutiny should be applied. The strict scrutiny applied in *Weber* must be applied to any mother-child class excluded from the benefits of a wrongful death statute because the state cannot arbitrarily choose to protect the fundamental liberty interests of some but not others without, as *Weber* states, showing a compelling state interest. *Weber* is consistent with the other precedent of this Court. Once a state acts to protect the fundamental interests of some individuals, it must act evenhandedly and provide protection to all unless there is a compelling state interest promoted by the challenged classification. *Harper v. Virginia*, 383 U.S. 663, 670 (1966).

The Court of Appeal stated "Karen Alexander has not demonstrated how these statutes affect her relationship with her unborn child." 114 F.3d at 1407. This statement ignored *Weber*. *Levy* clearly stated that wrongful death statutes involve the important familial relationship, and *Weber* stated that for that reason exclusion under the statute requires a compelling interest.

The relationship of Karen and Kaylyn Alexander was involved in the same way the interest in familial relationships of the litigants in *Levy*, *Glona* and *Weber* were involved. Mrs. Alexander is denied Equal Protection of the laws because she does not receive the compensation designed to replace the loss of the relationship with damages awarded under the statute. Award of compensation for the loss of the relationship is a principal purpose of the wrongful death statute. *Green v. Bittner*, 424 A.2d 210 (N.J. 1980). It is precisely because the litigants in *Levy*, *Glona* and *Weber* were denied the opportunity to seek compensation that their rights were violated.

However, Mrs. Alexander is affected even more profoundly than the litigants in *Levy*, *Glona* and *Weber*. In those cases the lack of protection for mothers of illegitimates usually afforded by the deterrence effect of tort law was not lost to those litigants.

As this Court pointed out, tortfeasors could not know who was illegitimate and who was not. However, as the New Jersey Supreme Court pointed out in *Giardina*, in medical malpractice cases there is no deterrent effect of tort law were the child is in utero, and the law actually encourages a tortfeasor to allow an injured child to die in utero. See, *Carey v. Lovett*, 622 A.2d 1279, 1286-87 ("a requirement of contemporaneous observation could disserve both objectives by providing physicians with an incentive to anesthetize the woman"). This fear of encouragement holds a unique concern where it comes to patients still in utero in an age when physicians perform fetal surgery on children as early as seventeen weeks gestation (See, App., 85-86) and medical texts on fetal surgery contain chapters on perceived lack of legal rights of the child. Robertson, J.A. "Legal Considerations in Fetal Treatment" in *The Unborn Patient*, 2nd Ed., editted by M.R. Harrison , 19-24.

C. The Decision of the Court of Appeals is in Direct Conflict with *Levy*, *Glona* and *Weber* which hold that a State which Excludes some Mother's from the Benefits of a Wrongful Death Statute must have a Legitimate State Interest which bears a Relationship to the Purpose of the Wrongful Death Statute.

Although the Court of Appeals mentions that, in a traditional scrutiny case, a statute meets the requirements of Equal Protection" if there is a rational relationship between the disparity of treatment and some legitimate governmental purpose," 114 F.3d at 1408, that Court does not identify a single interest of the State of New Jersey which justifies the disparity of treatment. 114 F.3d 1407-1408. This failure is in direct conflict with *Weber*, *Levy* and *Glona*, and all decisions of this Court dealing with Equal Protection jurisprudence. *Weber* made the rule of law plain:

> "The inferior classifications of (illegitimate children) bears, in this instance, no significant relationship to those recognized purposes of recovery which (wrongful death portion of) worker's compensation statutes commendably serve." *Weber*, 406 U.S. at 175.

Levy and *Glona*, in particular, stressed the need to demonstrate

how the disparity in treatment is justified by some interest of the state advanced by the classifications. Mrs. Alexander has litigated this case for three years and has clearly shown that there is *no* interest at all which supports the classification. Allowing the wrongdoer to act with impunity because his wrongful conduct operated to kill the child before birth could occur actually frustrates the very purpose for which the statute is created: [1] deter the killing of a child, and [2] compensate the mother for the loss of a relationship in which she enjoyes an interest protected as fundamental.

Mrs. Alexander demonstrated that New Jersey law is still burdened with the discriminatory classification because of a mistake. See discussion *supra* at 6-7; 13-15. A mistake of fact is not a basis which can be considered "rational" to discriminate against Mrs. Alexander. It is "irrational" and perfectly arbitary.

The Court of Appeals, not able to express a single interest of the state which relates to any legitimate state interest, recites that "the assumed legislative bases(sic) ... were discussed in *Giardina...*". *Giardina*, however, only stated that the explanation (not rational basis) for the existence of the classification was the mistake of fact the New Jersey Supreme Court corrected in *Smith v. Brennan*. See *supra*, 6-7; 13-15. There was no "basis", only a big mistake. The Court of Appeals states in its Due Process Section: "New Jersey has chosen to draw a bright line that eliminates the nearly impossible problems of proof inferred in such actions when injury to a fetus is at issue." 114 F.3d at 1406. This statement contradicts the reasoning of the New Jersey Supreme Court which has stated that there exist no such problems of proof on numerous occasions. Giardina, at 147; *Smith v. Brennan*, 157 A.2d at 503. Even if the state claimed that it had such an interest in mind to justify the classification, which he does not, the fact that it permits the same proof in (1) prenatal injury cases generally, (2) live birth cases when the injury occurs in utero, and (3) *Portee* claims in stillbirth cases, show that this concern cannot constitute a legitimate reason or interest to justify discrimination against Mrs. Alexander. *Gomez v. Perez*, 409 U.S. 535, 538 (1973). Mrs. Alexander can certainly prove in state court that Kaylyn's death was due to the defendants' negligence. The State of New Jersey itself did an autopsy which established the cause of death, the causal relationship of which is routinely proven in fetal distress cases on an almost daily basis.

The decision of the Court of Appeals violates the plain mandate of *Weber*, *Glona* and *Levy*.[7]

II. THE HOLDING OF THE COURT OF APPEALS THAT THERE ARE HUMAN BEINGS WHO DO NOT HAVE EQUAL PROTECTION RIGHTS UNDER THE FOURTEENTH AMENDMENT IS IN DIRECT CONFLICT WITH THE DECISIONS OF THIS COURT INCLUDING *LEVY V. LOUISIANA*, *PLYLER V. DOE*, AND *YICK WO V. HOPKINS*. THE INCORRECT INTERPRETATION OF THIS COURT'S DECISION IN *ROE V. WADE* BY THE COURT OF APPEALS CREATES A CONFLICT IN THE DECISIONAL LAW OF THIS COURT WHICH ONLY THIS COURT CAN AND SHOULD RESOLVE.

The Third Circuit accepted as true that Kaylyn Alexander and all children of her class are "complete, separate and irreplaceable human beings" who have actual relationships with their mothers and that Kaylyn and other children are capable of experiencing pain beginning at eight weeks gestation. 114 F.3d at 1401.

Despite these facts, The Court of Appeals decided that Kaylyn does not enjoy Equal Protection Rights because, it held, there are persons in fact who do not have Constitutional Rights.

> "The short answer to plaintiff's argument is that the issue is not whether the unborn are human beings, but whether the unborn are constitutional persons." 114 F.3d at 1402.

In support of this proposition the Court of Appeals cited no decision of this Court but relied upon a law review article. This Court stated in *Roe v. Wade*, 440 U.S. 113, 159 in 1973 that it could not determine when the life of a child began and that this Court at that "point in the development of man's knolwedge, [was] not in a position to speculate as to the answer". The Court of Appeals interpreted *Roe* to mean that this Court has held that there are human beings (persons in fact) who have no Equal Protection

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[7]Under New Jersey Law it is clear that a declaration that the statute violates the Equal Protection Rights of Mrs. Alexander would result in the New Jersey Courts continuing to allow wrongful death recoveries, it would just apply the law in a manner consistent with this Court's mandate. *Right to Choose v. Byrne*, 91 N.J. 287, 311-312 (1982).

Rights. In reaching that interpretation of *Roe*, it ignored the plain language of this Court in *Levy v. Louisiana*, 391 U.S. 68 (1968), *Plyler v. Doe*, 457 U.S. 202 (1982) and *Yick Wo v. Hopkins*, 118 U.S. 356 (1885) all of which were thoroughly briefed below.

The obvious injustice of the statement prompted a concurring opinion, although in agreement with the result in this case, which expressed alarm at the harsh implications of such a holding:

> "...the Court's suggestion that there could be 'human beings' who are not 'constitutional persons' is unfortunate.

A. The Decision of the Court of Appeals Denying Equal Protection Rights to Kaylyn Alexander Conflicts With the Court's Decision in *Levy*, and the principles set forth in *Plyler* and *Yick Wo*.

The Equal Protection Clause of the Fourteenth Amendment protects *every* living human being, without exception. *Levy v. Louisiana*, 391 U.S. 68, 70 (1968). It would be an inherent contradiction to argue that the equal protection clause could itself contain a classification which withholds its protection of equality from anyone. *Plyler v. Doe*, 457 U.S. 202, 213 (1982). To be protected by the clause this Court has stated individuals need only: [1] [be] "human", [2] be "alive", and [3] "have being". *Levy*, 391 U.S. at 70. One need only be a "living human being".

The child's right to the equal protection of the laws is implicated and violated by the wrongful death and survival action statutes. Karen Alexander, as mother of Kaylyn, possesses the standing to litigate Kaylyn's equal protection rights although she is deceased. *Califano v. Goldfarb*, 430 U.S. 199, 206-208 (1977). There is obvious and critical importance to the finding of fact that Kaylyn Alexander is a human being.

This Court's holding in *Levy* is consistent with [1] the understanding of the drafters of the Fourteenth Amendment; and [2] the controlling principles of the Equal Protection Clause itself. Numerous statements show the basic assumption of the framers that "in the eyes of the Constitution, every *human being* within its sphere...from the President to the slave, is a *person*." Cong. Globe, 37th Cong., 2d Sess. 1449 (1862) (Sen. Sumner) (first emphasis added). It is clear that the framers of the Amendment intended the Due Process Clause to be coextensive with the total class of all humanity, as a constitutional codification of the natural and

inalienable rights. John Bingham, the author of section 1 of the Fourteenth Amendment, clearly equated the word "person" with "human being", using the terms interchangeably:

> The provision of our Constitution is, "no person shall be deprived of life, or liberty, or property without due process of law."...this new Magna Carta to mankind declares the rights of all to life and liberty and property; that *no person* ...shall be deprived of life or liberty or property without due process of law. ...I would pass the bill, not only for the sake of giving present relief to the unfortunate *human beings* for whose special relief it is designed but I would pass this bill for the purpose as well of giving assurance...that no man shall ever, in the coming future,...be deprived of his life, of his liberty, or his property without due process of law. Cong. Globe, 37th Cong. 2d Sess. (April 11, 1862) 1683-1690. Similiar Bingham Statements at Cong. Globe, 35th Cong. 2d Sess. 983 (1859); Cong. Globe, 37th Cong. 2d Sess. 1638 (1862); See also, Cong. Globe, 40th Cong., 1st Sess. 542 (1869); Cong. Globe, 35th Cong. 1st Sess. app. 65-66 (1858). [Emphasis added].

Natural and inalienable rights and the right to life itself are not derived from government but from the fact of the individual's existence, and the interest that each possesses in life. *Yick Wo v. Hopkins*, 118 U.S. 356, 369-370 (1886); Constitution of the United States of America: Analysis and Interpretation, Killian, J. et al., ed. (1987), at p. 1623; Arkes, H. *Beyond the Constitution*, Prin. Univ. Press (1990). The essence of these rights themselves prohibit denial by classification or deprivation of its inherent value. The Declaration of Independence states that man's 'unalienable' right to life is a 'self-evident truth', and the purpose of our government is to protect the natural rights of people. This understanding was shared by both the founding fathers and the framers of the Fourteenth Amendment, the embodiment of this inspiration. *The Works of James Wilson*, Ed. by James DeWitt Andrews, Callaghan & Co., Chicago (1896) Vo. I & II p.314-335.

Thus, the fundamental purpose of section one of the 14th Amendment Due Process Clause was the protection of natural rights, and the clause was a "confirmatory reference" to the pre-existing "affirmative duty of government to protect [persons] in

their natural rights." And the Equal Protection Clause guaranting equality of protection was a modifying condition. Because of the "inalienable" and "natural" character of the Due Process rights, Bingham and the other framers of the Fourteenth Amendment created the clause for the purpose of reaffirming them as rights beyond the reach of government to withhold from any class of human beings. Jacobus tenBroek, *The Anti-Slavery Origins of the Fourteenth Amendment* (1931) 219-221. See also *Yick Wo v. Hopkins*, 118 U.S. 356, 369-370 (1885).

Levy's holding that all living human beings are protected by the Equal Protection Clause is supported by the logic that if the clause were to be interpreted to exclude any class of human beings, that interpretation would undermine the purpose of the clause.

> "To permit a state [to interpret the Equal Protection Clause] in order to identify subclasses of persons whom it would define as beyond its jurisdictions, thereby relieving itself of the obligations to assure that its laws are designed and applied equally to those persons, would undermine the principal purpose for which the Equal Protection Clause was incorporated in the Fourteenth Amendment." *Plyler v. Doe*, 457 U.S. 202, 213 (1982) (citing John Bingham's comments that show that the class covered by equal protection was intended to be co-extensive with all humanity. 457 U.S. at 214-215).

B. The Court of Appeals Interpreted This Court's Decision in *Roe v. Wade* to Mean There Can Be Human Beings Who Have No Equal Protection Rights. Incorrect Interpretation of *Roe* By the Court of Appeals Creates a Conflict in the Decisional Law of This Court Which only This Court Can, and Should, Resolve.

When the Court of Appeals held that there can be human beings who have no Equal Protection Rights, it did so in reliance upon this Court's statement in *Roe v. Wade*, 410 U.S. 113, 158 (1973) that the Fourteenth Amendment does not "include the unborn." 114 F.3d at 1400. The entire basis for this statement in *Roe* was this Court's conclusion that in 1973 it was not able to determine when the life of a human being began:

> We need not resolve the difficult question of when life by...the judiciary, *at this point in the development of man's knowledge*, is not in a position to speculate as to the answer 410 U.S. at

159 (emphasis added).

Roe simply ruled that in 1973 it could not determine when the life of the human being began. *Roe* reserved the answer to that question for a later court when "man's knowledge" is sufficient. In the absence of such a finding of fact the court found no independent basis to support the conclusion that the "fetus" enjoyed rights regardless of the fact that it could not be determined to be a human being. Nor did *Roe* rule that there *are human beings who are not* protected by the Equal Protection Clause. To do so would have required a legal discussion in which the court did not engage and required an overruling of *Levy v. Louisiana, supra* and *Yick Wo v. Hopkins,* 118 U.S. 356 (1885) which the court did not provide. *Levy* made it clear that no human being is to be excluded from equal protection.

Ultimately whether Kaylyn possesses rights under the Equal Protection Clause is a mixed question of fact and law. The rule of law is clear. Under *Levy* all living human beings are protected. 391 U.S. at 70. In 1973 the *Roe* court felt that the fact of whether the child is a living human being before birth could not be definitively decided. The *Levy* and *Roe* cases are reconciled by a determination of fact. Relevant is the statement of Justice Brandeis in *Burnet v. Coronado Oil and Gas Co.*,[8] 285 U.S. 393, 405-413 that a new appreciation of facts not previously understood will change the outcome for Equal Protection rulings even though the legal principles remain unchanged:

> The controversy is usually over the application to existing conditions of some well recognized constitutional limitation. This is strikingly true of cases under the equal protection clause when a question is whether there is any reasonable basis for the classification made by a statute;...In every such case the decision...is dependent upon the determination of...a fact, as distinguished from the declaration of a rule of law. When the underlying fact has been found, the legal result follows inevitably. The circumstances that the decision of that fact is made by a court instead of by a jury, should not be allowed to obscure its real character. 285 U.S. at 410-411.

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[8]The Brandeis opinion has been frequently cited with approval. See *Solario v. U.S.*, 483 U.S. 435, 450 (1987) (expressly overruling *O'Callahan v. Parker*, 395 U.S. 250 (1969); *United States v. Scott*, 437 U.S. 82, 101 (1978); *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989) (Blackmun, J., dissenting).

Whether Kaylyn possesses equal protection rights is precisely such a mixed question of fact and law. The question of fact is now beyond dispute because of the development of technology, medical advances and knowledge which did not exist in 1973. (See A75-102). If there is a principle of law which justifies withholding Equal Protection Rights to Kaylyn, such that third parties can tortiously kill the child with impunity, such a principle has never been espoused by this Court.

The inference that the *Roe* Court itself was not in disagreement with the *Levy* holding is compelled by the fact that *Roe* never once mentioned *Levy*, or expressed disagreement with it. It is inconceivable that the *Roe* Court intended to suggest that there are human beings who possess no constitutional rights without [1] expressly stating such a holding; [2] addressing *Levy* and overruling it; [3] specifically addressing the entire body of law which requires government to protect the lives of all human beings; [4] addressing its own prior rulings, such as *Yick Wo v. Hopkins*, 118 U.S. 356 (1885), which holds that the right to live is possessed by human beings independent of the constitution; and [5] reconciling a constitution which fails to provide equal protection to some human beings, while providing protection for corporations [see, e.g. *Grosjean v. American Pres Co.*, 297 U.S. 233 (1936)].

With respect to Kaylyn Alexander, whose rights are raised, there is no doubt she is a person, a human being, in fact. The State of New Jersey performed an autopsy, found a cause of death of her person, and issued a death certificate in her name. It is obvious that this case presents an important constitutional question that only this Court can, and must, resolve.

The Petition in this case should be granted because the statement of the Court of Appeals that there are human beings without Constitutional Rights is in conflict with the decisions of this Court and as the concurring opinion suggests if the holding that there can be human beings who are "non-Constitutional" persons is left to stand it is capable of perpetuating great injustice and cannot be permitted to influence the development of Constitutional Law in the future.

HAROLD J. CASSIDY, ESQ.

Appendix A

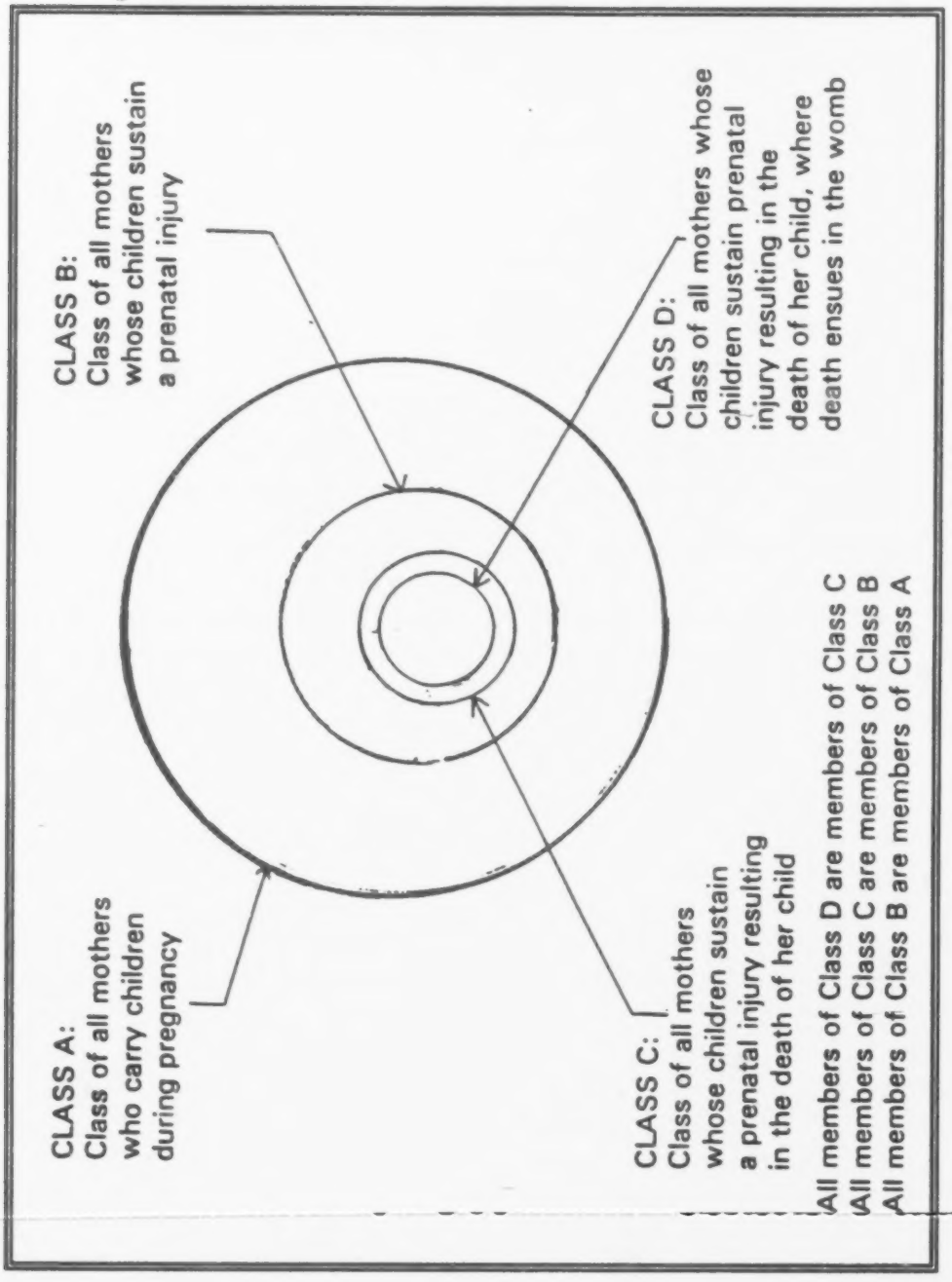
A chart depicting New Jersey claims for prenatal injuries which result in the child's death excerpted from a portion of the Brief filed with the U.S. Court of Appeals for the Third Circuit.

CLAIMS RECOGNIZED UNDER NEW JERSEY LAW FOR PRENATAL INJURIES TO A CHILD WHICH RESULTS IN THE CHILD'S DEATH

NATURE OF CLAIM	SOURCE OF CLAIM	INTERESTS PROTECTED	NATURE OF DAMAGES	CLAIMS RECOGNIZED WHERE CHILD'S PRENATAL INJURIES RESULT IN THE DEATH OF THE CHILD	
				DEATH ENSUES AFTER BIRTH	DEATH ENSUES BEFORE BIRTH
WRONGFUL DEATH	Derived from the relationship of mother and child	Mother's relationship with her child and the child's life	Pecuniary losses resultant from he loss of companionship with child	Yes	No
SURVIVAL ACTION	Derived from the relationship of mother and child	Child's health and life	Money damages for injury to child while alive	Yes	No
PORTEE CLAIM	Derived from the relationship of mother and child	Mother's health	Money damages for emotional distress of mother due to "loss of a loved one"	Yes	Yes

Appendix B

A chart excerpted from portion of Brief filed below depicting relationship of excluded class to classes given claim.


CLASS A:
Class of all mothers
who carry children
during pregnancy
CLASS B:
Class of all mothers
whose children sustain
a prenatal injury
CLASS C:
Class of all mothers
whose children sustain
a prenatal injury resulting
in the death of her child
CLASS D:
Class of all mothers whose
children sustain prenatal
injury resulting in the
death of her child, where
death ensues in the womb
All members of Class D are members of Class C
All members of Class C are members of Class B
All members of Class B are members of Class A

Appendix C

A List of the majority of States which permit wrongful death claims in "stillbirth cases"

I. Thirty-seven states and the District of Columbia now permit wrongful death claim in "stillbirth" cases. These include 1) Alabama - *Eich v. Gulf Shores*, 300 So.2d 354 (Ala. 1974); 2) Arizona - *Summerfied v. Superior Court*, 698 P.2d 712 (Ariz. Sup. Ct. 1985); *3) Colorado - Espadero v. Feld*, 649 F.Supp. 1480 (D. Colo. 1986); *Rottman v. Krabloonik, Inc.*, 834 F.Supp. 1269 (D. Colo. 1993); 4) Connecticut - *Gorke v. Leclerc*, 181 A.2d 448 (Conn. 1955); *5) Delaware - Worgan v. Greggo & Ferraro, Inc.*, 128 A.2d 557 (Del. Sup. Ct. 1956); *Luff v. Hawkins*, 551 A.2d 437, 438 n.1 (Del. Sup. Ct. 1988); *6) Washington D.C. - Greater Southeast Community Hosp. v. Williams*, 482 A.2d 394, 396 & n.2 (D.C. Ct. App. 1984); *7) Georgia - Porter v. Lassiter*, 87 S.E.2d 100 (Ga. App. 1990); *Wade v. United States*, 745 F.Supp. 1573 (D. Haw. 1990); 8) Idaho - *Volk v. Baldazo*, 651 P.2d 11, 13 (Idaho 1982); *9) Illinois - Chrisafogerorgis v. Brandenberg*, 304 N.E.2d 88 (Ill. 1973); 10) Indiana - *Britt v. Sears*, 277 N.E.2d 20 (Ind. App. 1971); *11) Kansas - Hale v. Manion*, 368 P.2d 1 (Kan. 1962); *12) Kentucky - Mitchell v. Couch*, 285 S.W.2d 901 (Ky 1955); 13) Louisiana - *Danos v. St. Pierre*, 402 So.2d 633 (La. 1981); *State ex rel. Odham v. Sherman*, 198 A.2d 71 (1964); 14) Massachusetts - *Mone v. Greyhound Lines, Inc.*, 331 N.E.2d 916 (Mass. 1975); *15) Michigan - O'Neill v. Morse*, 188 N.W.2d 785 (Mich. 1971); *Jarvis v. Providence Hospital*, 444 N.W.2d 236, 238 (Mich. App. 1989); 16) Minnesota - *Verkennes v. Corniea*, 38 N.W.2d 838 (Minn. 1949); *17) Mississippee - Rainey v.Horn*, 72 So.2d 434 (Miss. 1954); 18) Montana - *O'Grady v. Brown*, 654 S.W.2d 904 (Mo. 1983); *Strzelczyk v. Jett*, 870 P.2d 730 (Mont. 1994); 19) Nevada - *White v. Yup*, 458 P.2d 617, 620-621 (Nev. 1969); 20) New Hampshire - *Polinquin v. MacDonald*, 135 A.2d 249 (N.H. 1957); *21) New Mexico - Salaza v. St. Vincent Hosp.*, 619 P.2d 826 (N.M. Ct. App. 1980); *22) North Carolina -*

DiDonato v. Wortman, 358 S.E.2d 489 (N.C. 1987), *reh'g den.*, 361 S.E.2d 73 (1987); *23) North Dakota - Hopkins v. McBane*, 359 N.W.2d 862, 864 (N.D. 1985); 24) Ohio - *Werling v. Sandy*, 476 N.E.2d 1053 (Ohio 1985); 25) Oklahoma - *Evans v. Olson*, 550 P.2d 924, 927 (Okla. 1976); *26) Oregon - Libbee v. Permanente Clinic*, 518 P.2d 636 (Or. 1974), *reh'g den.*, 520 P.2d 361 (1974); 27) Pennsylvania - *Amadio v. Levin*, 501 A.2d 1085 (Pa. 1985); *Presley v. Newport Hospital*, 365 A.2d 748 (R.I. 1976); *28) South Carolina - Fowler v. Woodward*, 138 S.E.2d 42 (S.C. 1964); *Re Certification of Question of Law from United States District Court*, 387 N.W.2d 42 (S.D. 1986); 29) Tennessee - Tenn. Code Ann. §20-5-106(c) (Supp. 1991) (legislatively overruling *Hamby v. McDaniel*, 559 S.W.2d 774 (Tenn. 1977); 30) Vermont - *Vaillancount v. Med. Center Hosp. of Vermont*, Inc., 425 A.2d 92, 94-95 (Vt. 1980); *31) Washington - Moen v. Hanson*, 537 P.2d 266 (Wash. 1975); *32) West Virginia - Baldwin v. Butcher*, 184 S.E.2d 428; 431-32 (W. Va. 1971); *Farley v. Sartin*, 466 S.E.2d 522 (W. Va. 1995); 33) Wisconsin - *Kwaterski v. State Farm*, 148 N.W. 2d 107, 109 (Wis. 1967).

II. The modern trend for the states to recognize the wrongful death claims in stillbirth cases even for stillbirths prior to viability has extended to 1) West Viriginia - *Farley v. Sartin*, 466 S.E.2d 522 (W. Va. Dec. 15, 1995)(interpreting statute to provide claims for death of children throughout pregnancy).; *2) Georgia - Porter v. Lassiter*, 87 S.E.2d 100 (Ga. 1955) (quickening); 3) Illinois - Ill Comp. Stat., ch. 740, §180/2.2 (1992) (any time during pregnancy) (legislatively overruling *Green v. Smith*, 377 N.E.2d 37 (1978); see *Smith v. Mercy Hosp. and Medical Center*, 560 N.E.2d 1164 (1990) (viability of fetus not necessary to sustain wrongful death action); *4) Louisiana - Johnson v. Southern New Orleans Light & Traction Co.*, (La. App. Orl. Dec. 10, 1923) (rejecting viability standard for wrongful death of unborn child); *Danos v. St. Pierre*, 402 So.2d 633, 639 (La. 1981) (Approving Johnson's rejection of viability); *Danos v. St. Pierre*, 383 So.2d 1019, 1027 (La. App. 1980); aff'd 402 So.2d 633 (La. 1991) (Lottinger, J. concurring); 5) Missouri -*Conner v. Monkem*, 898 S.W.2d 89 (Mo. 1995) (interpreting statute setting forth rule of construction); *6) South Dakota - S.D. Code Laws Ann.*, §21-5-1 (1987) (amending wrongful death statute to include "an unborn child" for total period of gestation); *Re Certification of a Question of Law from the*

United States District Court, __ N.W.2d __ (Docket No. 19017) (Feb. 15, 1996)(interpreting statute to allow wrongful death action at any stage of pregnancy).

III. In addition, the modern trend among the states is to ignore "viability" as relevant to claims for prenatal torts. Twenty eight states that have expressly or impliedly rejected "viability" as relevant to prenatal injuries are: [1] Alabama [*Wolfe v. Isbell,* 280 So. 2d 758, 761 (Ala. 1973) (express statment in context of wrongful death action)] [2] Arizona [*Walker by Pizano v. Mart.* 790 P.2d 735, 739 (Ariz. Ct. App. 1990) (*dictum* in wrongful life action)]; [3] California [*CAL. CIV. CODE*, sec. 29 (West 1982); *Keleman v. Superior Court,* 186 Cal. Rptr. 566, 568 (Ct. App. 1982) (prenatal injury); *Endo Laboratories, Inc. v. Hartford Ins. Group,* 747 F.2d 1264 (9th Cir. 1984) (applying California law)]; [4] Colorado [*Empire Cas. v. St. Paul Fire & Marine,* 764 P.2d 1191, 1195-97 (Colo. 1988) (by implication)]; [5] Connecticut [*Simon v. Mullin*, 3870 A.2d 1353, 1357 (Conn. 1977) (prenatal injury)]; [6] Florida [*Day v. Nationwide Mut. Ins. Co.*, 328 So. 2d 560, 562 (Fla. Dist. Ct. App. 1976) (prenatal injury)] [7] Georgia [*Hornbuckle v. Plantation Pipe Line Co.*, 93 S.E. 2d 727 (Ga. 1956) (prenatal injury)]; [8] Illinois [*Renslow v. Mennonite Hosp.* 367 N.E.2d 1250, 1252-53 (Ill. 1977) (express statement in recognizing cause of action for preconception tort)] [9] Indiana [*Cowe by Cowe v. Forum Group, Inc.*, 541 N.E.2d 962, 967-68 (Ind. Ct. App. 1989), *transfer granted*, 575 N.E.2d 630,636-37 (Ind. 1991) (pre-natal injury); [10] Kansas [*Humes v. Clinton*, 792 P.2d 1032, 1037 (Kan. 1990) (dictum)]; [11] Louisiana [*Danos v. St. Pierre*, 402 So.2d 633 (La. 1981) (by implication in wrongful death action)] [12] Maryland [*Group Health Ass'n, Inc. v. Blumenthal*, 453 A.2d 1198, 1206-07 (Md. 1983) (express statement)]; [13] Massachusetts [*Payton v. Abbott Laboratories*, 437 N.E.2d 171, 182-85 (Mass. 1982); *Torigian v. Watertown News Co.*, 225 N.E.2d 926 (Mass. 1967) by implication in wrongful death action) (prenatal injury)] [14] Michigan [*Womack v. Buchhorn,* 187 N.W.2d 218 (Mich. 1971) (prenatal injury)]; [15] Montana [*Bergstresser v. Mitchell,* 448 F. Supp. 10, 14-15 (E.D. Mo. 1977), *aff'd* 577 F.2d 22, 25-26 (8th Cir. 1978) (by implication in recognizing cause of action for pre-conception tort)]; *Miller v. Duhart*, 637 S.W.2d 183, 186 (Mo. Ct. App. 1982) (*dictum*)] [16] Nevada [*Weaks v. Mounter*, 493 P.2d 1307, 1309

(Nev. 1972) (prenatal injury); *White v. Yup*, 458 P.2d 617, 620-21 (Nev. 1969) (express statement in conext of wrongful death action)]; [17] New Hampshire [*Bennett v. Hymers*, 147 A.2d 108 (N.H. 1958) (prenatal injury)]; [18] New Jersey [*Smith v. Brennan*, 167 A.2d 497, 502 (N.J. 1960) (prenatal injury)]; [19] New York [*Kelly v. Gregory*, 125 N.Y.S.2d 696, 697 (N.Y. App. Div. 1953) (prenatal injury)]; *Hughson v. St. Francis Hosp. of Port Jervis*, 459 N.Y.S.2d 814, 815 (N.Y. App. Div. 1983) (same)]; [20] North Carolina [*Stetson v. Easerling*, 161 W.E.2d 531, 533-34 (N.C. 1968) (express statement in context of wrongful death action)]; [21] North Dakota [*Hopkins v. McBane*, 359 N.W.2d 862, 864 (N.D. 1985) (adopting sec. 869(1) of the *RESTATEMENT (SECOND) OF TORTS* (1979)]; [22] Oklahoma [*Evans v. Olson*, 550 P.2d 924, 927 (Okal. 1976) (express statement in context of wrongful death action)]; [23] Pennsylvania [*Sinkler v. Kneale*, 164 A.2d 93, 96 (Pa. 1960) (prenatal injury)]; [24] Rhode Island [*Sylvia v. Gobeille*, 220 A.2d 22 (R.I. 1966) (prenatal injury)]; [25] Texas [*Delgado v. Yandell*, 468 S.W.2d 475 (Tex. Crim. App. 1971), *writ re'd n.r.e. per curiam*, 471 S.W.2d 569 (Tex. 1971) (prenatal injury)]; [26] Virginia [*Kalafut v. Gruver*, 389 S.E. 2d 681, 683-84 (Va. 1990) (adopting sec. 869(1) of the *RESTATEMENT (SECOND) OF TORTS*)]; [27] Washington [*Seattle-First National Bank v. Rankin*, 367 P.2d 835, 837-38 (Wash. 1962) (prenatal injury); *Harbeson v. Parke-Davis, Inc.*, 656 P.2d 483,495 (Wash. 1983) (*dictum* in wrongful life case)]; [28] Wisconsin [*Kwaterski v. State Farm Mut. Auto. Ins. Co.*, 148 N.W.2d 107, 109 (Wis. 1967) (express statement in context of wrongful death action), *overruled on other grounds*; *Puhl v. Milwaukee Auto. Ins. Co.*, 99 N.W.2d 163, 169-71 (Wis. 1959) (*dictum*); *In re Estate of Stromsten*, 299 N.W. 2d 226 (Wis. 1980)].

IV. Eleven states recognize claims for prenatal injuries after "viability" but have not determined, one way or the other, whether "pre-viability" injuries are actionable: [1] Delaware [*Worgan v. Greggo & Ferrara, Inc.* 128 A.2d 557 (Del. Super. Ct. 1956) (express staement in context of wrongful death action); *Luff v. Hawkins*, 551 A.2d 437, n.l (Del. Super. Ct. 1988) (express statement); [2] District of Columbia [*Greater Southeast Community Hosptial v. Williams*, 482 A.2d 394, 396 & n.2 (D.C. 1984) (express statement)]; [3] Idaho [*Volk v. Baldazo*, 651 P.2d 11, 13 (Idaho 1982) (express statement)] [4] Kentucky [*Mitchell v. Couch*,

285 S.W.2d 901 (Ky. 1955) (by implication in wrongful death action)]; [5] Minnesota [*Verkennes v. Corniea*, 38 N.W.2d 838 (Minn. 1949) (by implication in wrongful death action)]; [5] Mississippi [*Rainey v. Horn*, 72 So.2d 434 (Miss. 1954) (express statement in wrongful death action)]; [6] New Mexico [*Davila v. Bodelson*, 704 P.2d 1119 (N.M. Ct. App. 1985) (prenatal injury)]; [7] Ohio [*Williams v. Marion Rapid Transit, Inc.*, 87 N.E.2d 334 (Ohio 1949) (prenatal injury)]; [8] Oregon [*Mallison v. Pomeroy*, 291 P.2d 225 (Or. 1955) (prenatal injury)]; [8] South Carolina [*Hall v. Murphy*, 113 S.E.2d 790 (S.C. 1960) (express statement in context of wrongful death action); [9] Tennessee [*Shousha v. Matthews Drivurself Service, Inc.*, 358 S.W.2d 471, 476 (Tenn. 1962) (express statement)]; [10] Vermont [*Vaillancourt v. Medical Center Hospital of Vermont, Inc.*, 425 A.2d 92, 94-95 (Vt. 1980) (by implication in wrongful death action)] [11] West Virginia [*Baldwin v. Butcher*, 184 S.E.2d 428, 431-32 (W. Va. 1971) (express statement in context of wrongful death action)].

V. The other eleven states appear to have never reached a decision concerning whether prenatal injuries are actionable. There are no reported prenatal injury cases in Alaska, Arkansas [but see *Graham v. Sisco*, 449 S.W.2d 949 (Ark. 1970) (recognizing action for injuries inflicted in course of Caesarean section)), Iowa [(see *Weitl v. Moes*, 311 N.W.2d 259, 272 n.8 (Iowa 1981); but see *Kilker by and through Kilker v. Mulry*, 437 N.W.2d 1,2 (Iowa Ct. App. 1988) (apparently recognizing existence of cause of action for prenatal injuries); *Oswald v. LeGrand*, 453 N.W. 2d 634 (Iowa 1990); *Lamber v. Sisters of Mercy Health Corp.*, 369 N.W.2d 417 (Iowa 1985)]; Hawaii, Maine, Montana [(see *Kuhnke v. Fisher*, 683 P.2d 916, 919 (Mont. 1984)], Nebraska [see *Drabbels v. Skelly Oil Co.*, 50 N.W.2d 220, 232 (Neb. 1951); but see *Miles v. Box Butte County*, 489 N.W.2d 829 (Neb. 1992) (affirming substantial damage award for prenatal injuries sustained shortly before delivery)); South Dakota (see *In re Certification of Questions of Law from United States District Court*, 387 N.W.2d 42, 45 (S.D. 1986), Utah, or Wyoming.

VI. Other than New Jersey there are nine state which do not allow wrongful death claims for children who are stillborn. There are: [1] California, *Justus v. Atchinson*, 565 P.2d 122 (Cal. 1977); [2] Florida, *Stokes v. Liberty Mut. Ins. Co.*, 213 So. 2d 695

(Fla. 1968); *Stern v. Miller*, 348 So. 2d 303 (Fla. 1977); *Hernandez v. Garwood*, 390 So. 2d 357 (Fla. 1980); *Simon v. United States*, 438 F. Supp. 759, 761 (S.D. Fla. 1977) (applying Florida law); [3] Iowa, *McKillip v. Zimmerman*, 191 N.W.2d 706 (Iowa 1971); [4] Maine, *Milton v. Cary Medical Ctr.*, 538 A.2d 252 (Me. 1988); [5] Montana, *Kuhnke v. Fisher*, 683 P.2d 916 (Mont. 1984); [6] Nebraska, *Drabbels v. Skelly Oil Co.*, 50 N.W.2d 229 (Neb. 1951); *Egbert v. Wenzl*, 260 N.W.2d 480 (Neb. 1977); *Smith v. Columbus Community Hosp., Inc.*, 387 N.W.2d 490 (Neb. 1986); [7] New York, *Endresz v. Friedberg*, 248 N.E.2d 901 (N.Y. 1969); [8] Texas, *Witty v. American Gen. Capital Distribs., Inc.*, 727 S.W.2d 503 (Tex. 1987); [9] Virginia, *Lawrence v. Craven Tire Co.*, 169 S.E.2d 440 (Va. 1969).